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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/429,939	10/29/1999	MICHEL AUTHIER	89003-44	6547
28291 7590 03/05/2007 FETHERSTONHAUGH - SMART & BIGGAR 1000 DE LA GAUCHETIERE WEST SUITE 3300 MONTREAL, QC H3B 4W5 CANADA			EXAMINER FETSUGA, ROBERT M	
			ART UNIT 3751	PAPER NUMBER
SHORTENED STATUTORY PERIOD OF RESPONSE		MAIL DATE	DELIVERY MODE	
3 MONTHS		03/05/2007	PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	<b>Application No.</b> 09/429,939	<b>Applicant(s)</b> AUTHIER ET AL.	
	<b>Examiner</b> Robert M. Fetsuga	<b>Art Unit</b> 3751	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 04 January 2007.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 42-67 is/are pending in the application.
- 4a) Of the above claim(s) 46,47,55 and 56 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 42-45,48-54 and 57-67 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☒ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

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1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on January 04, 2007 has been entered.

2. Claims 46, 47, 55 and 56 are withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected species, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on January 26, 2006.

3. The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required: Proper antecedent basis for the "rate of purge data element" set forth in claims 42, 51, 60 and 66, "method" set forth in claim 60, and "means" language set forth in claim 66, could not be found in the specification. Applicant is reminded claim terminology in mechanical cases should appear in the descriptive portion of the specification by reference to the drawing(s).

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4. Claims 49, 58 and 64 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The claims recite activating a water heater in response to a "rate of purge data element". This subject matter is not found in the originally filed disclosure and is therefore considered to be new matter. To the extent the "rate of purge data element" language reflects the subject matter represented in "TABLE 2" on page 6 of the instant specification, the ambient air sensor 17 is not disclosed as performing the newly claimed function.

5. Claims 62-65 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 60 is ambiguous as attempting to embrace two different statutory classes of invention. The claim preamble recites a "method", but the body thereof attempts to rely upon product/apparatus limitations for patentability. See *IPXL Holdings LLC v. Amazon.com Inc.* 77 USPQ2d 1140.

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6. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

7. Claims 42-45, 49, 51-54, 58, 60, 64, 66 and 67 are rejected under 35 U.S.C. 102(b) as being anticipated by applicant's acknowledged prior art.

Applicant's acknowledged prior art of Fig. 1 discloses a system comprising: a temperature sensor 3; a controller 11; a tub 7; a water heater 9; piping (illustrated); and a pump 13, as claimed. As a practical matter, the broad claim language defining the function of the sensor to be "associated to the ambient air temperature near the spa" (claim 42 for example) does not distinguish sensor 3 as ambient air temperature would affect the spa 1 and the components associated therewith.

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Furthermore, the controller 11 is a processor that would be capable of performing the recited function (i.e. "being operative for"). Re claim 60, the controller 11 can operate to "repetitively" activate both the pump 13 and heater 9 (pg. 2 of instant specification).

8. Claims 42, 43, 45, 51, 52 and 54 are rejected under 35 U.S.C. 102(b) as being anticipated by Lively.

The Lively reference discloses a system comprising: a temperature sensor 111; a controller (Fig. 3); a tub 11; piping (Fig. 1); and a pump 20, as claimed. The Lively controller is capable of performing the recited function (i.e. "being operative for").

9. Claims 42-45, 49, 51-54, 58, 60-64, 66 and 67 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tompkins et al. '720 and Lively.

The Tompkins et al. '720 (Tompkins) reference discloses a system comprising: a controller 12,14; a tub 11; a water heater 26; piping 35; and a pump 24. Re claims 60-64, the controller is operative for processing the temperature sensor signal, as claimed (col. 8 lns. 25-32, col. 18 ln. 66 thru col. 19 ln. 12). Therefore, Tompkins teaches all claimed elements except for the provision of an ambient air temperature sensor.

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Although the controller of the Tompkins spa system does not include an ambient air temperature sensor, as claimed, attention is directed to the Lively reference which discloses an analogous system which further includes a controller (Fig. 3) having an ambient air temperature sensor 110,111. Therefore, in consideration of Lively, it would have been obvious to one of ordinary skill in the spa system art to associate an ambient air temperature sensor with the Tompkins controller in order to protect against a damaging air temperature.

10. Claims 48 and 57 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tompkins and Lively as applied to claims 42 and 51 above, and further in view of Janosko.

Although the temperature sensor of the Tompkins spa system is not inside the controller, as claimed, attention is directed to the Janosko reference which discloses an analogous spa system which further includes a temperature sensor 199 inside a controller 196. Therefore, in consideration of Janosko, it would have been obvious to one of ordinary skill in the spa system art to associate controller mounting with the Tompkins temperature sensor in order to reduce installation/manufacturing cost.

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11. Claims 50, 59 and 65 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tompkins and Lively as applied to claims 42 and 51 above, and further in view of Dundas.

The Tompkins system further comprises a blower 28.

Dundas teaches it is common to operate a blower 19 during freezing conditions (col. 4 lns. 22-25). To automate the blower operation taught by Dundas with the controller taught by Tompkins would have been obvious in order to enhance freeze protection.

12. Applicant is referred to MPEP 714.02 and 608.01(o) in responding to this Office action.

13. Any inquiry concerning this communication should be directed to Robert M. Fetsuga at telephone number 571/272-4886 who can be most easily reached Monday through Thursday. The Office central fax number is 571/273-8300.



Robert M. Fetsuga  
Primary Examiner  
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